

### Theory in Practice: Lessons from Norway

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# Theory in Practice: Lessons from Norway

*Thomas Thiede*

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## 1. Introduction

The following article was literally born in two workshops on “Differences in Legal Method as an Expression of Differences in Legal Culture – Possibilities and Challenges” in Bergen, Norway in fall 2011 and winter 2012. One may not say that the article saw the light of day as most of the ideas and arguments contained within are the result of debates held in the dark of the night, which at times came as early as 3pm.

Researchers from Germanic countries (that is Austria, Germany and Switzerland) as well as Nordic countries (that is Denmark, Finland, Norway and Sweden) were looking for a small-scale example to discuss their respective methodologies when finding solutions to a common problem. In this situation the examples of prurient pictures of Scandinavian, Germanic and other nobility in the gutter press – the Crown Princess of Norway *Mette-Marit*, the Hereditary Princess of Monaco *Caroline* and the Duchess of Cambridge *Kate* just to name few – appealed to all

participants and the examples were repeatedly taken up by the respective national reporters during the workshops to explain and clarify peculiar differences and similarities in their country's methodology.

This report attempts to preserve these discussions. Firstly, the distinct style of Germanic versus Scandinavian argument can sometimes be traced back when reading the following lines. Readers should not be surprised when meeting new stances and when presented with more than one perspective on familiar topics. However, the idea to present the aforementioned discussions is somewhat obscured by the necessary subjective view of its German born, yet Austrian educated, reporter – who is nevertheless in a decade long constant discussion with his Norwegian colleagues – as well as the use of the English language, which at times produced false friends or was simply inadequate to provide for linguistic means to describe specific concepts.<sup>1</sup> Secondly and more importantly, based on some of the resemblances of the legal systems engaged, we were able to provide an innovative answer to the problem of cross-border invasions to privacy and reputation in conflict of laws. Accounting for the great geographical and, indeed, intellectual scope of countries covered in the workshops this solution should not remain exclusive to the participants of the workshops but can be transposed globally. In the face of its comparative legal birthplace it is hoped that the result may inspire other legal practitioners and scholars in countries beyond the Germanic and Nordic legal families as well.

## 2. The Problem Outlined

In an era of global news networks and internationally distributed media, personal information is ripe for dissemination beyond national borders faster than ever. At the same time, potentially injurious media coverage is not always unjustified as comprehensive information is considered essential to society and often benefits from a degree of constitutional protection.<sup>2</sup> For this purpose many civilian jurisdictions in continental Europe rely on codified personality rights. Even in the common law similar protection of reputation and privacy is increasingly visible

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<sup>1</sup> Cf. *Pierre Legrand*, A Diabolic Idea, in: Arthur Hartkamp, Martijn Hesselink, Ewoud Hondius, Carla Joustra, Edgard du Perron and Muriel Veldman (eds.), *Towards a European Civil Code*, 3<sup>rd</sup> ed., The Hague 2004, p. 245 ff.; *Pierre Legrand*, The same and the different, in: Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge 2003, p. 240 ff.; see *Simonæs*' chapter in this book.

<sup>2</sup> Cf. *Gert Brüggemeier*, Protection of personality rights in the law of delict/tort in Europe: mapping out paradigms, in: Gert Brüggemeier, Aurelia Colombi Ciacchi and Patrick O'Callaghan (eds.), *Personality Rights in European Tort Law*, Cambridge 2010, p. 5 ff.; *Helmut Koziol*, Summary and Outlook, in: Helmut Koziol and Alexander Warzilek (eds.), *Protection of Personality Rights against Invasions by the Mass Media*, Vienna/New York 2005, p. 681 ff.; *Thomas Thiede*, *Internationale Persönlichkeitsrechtsverletzungen*, Vienna 2010, p. 185 ff.

alongside the longstanding protection given by the law of defamation. However, one must understand that within these national frameworks it is left to the courts and legislators to balance the interests of the parties concerned and virtually identical fact-patterns prompt diverging results depending on the national law under which the case is litigated. This is not only a result of differences in material law, but also strongly coloured by the prevalent legal method of the deciding state.

Consequently, where, for instance, the subject of injurious media coverage resides or maintains significant standing in a State other than the one where such coverage was disseminated, the issue of conflict of laws, that is which law ought to be applied presents itself as often decisive for the claim and thus of great importance. In spite of this finding, a prominent clear-cut rule on the law applicable to such cross-border personality rights invasions is currently absent from statute and case law in Europe. In fact, under the Rome II Regulation,<sup>3</sup> originally designed to answer the question on the law applicable, the European legislator excluded non-contractual obligations arising out of violations of rights relating to personality from the scope of the regulation.<sup>4</sup>

### 3. Initial Observations

The above example became so prominent in the workshops because an initial look into the topic may result in the firm belief that sufficient differences could be thought to exist in substantive national law as well as conflict of laws rules justifying the exclusion by the European legislator.

Two different fields of law come to a problematic interaction. Firstly, whereas bodily injury or property harm both tend to be identifiable throughout all legal systems, privacy and reputation lack a clearly defined, physical manifestation, making infringements of them more slippery to determine in substantive law. Indeed, in most systems, only a comprehensive balancing of the interests involved can determine whether there was a personality right at all, before assessing any possible infringement by the publication. In other words, “manifested” rights are (at least in laymen’s terms) identical within the different legal systems – a punch in the face is almost universally accepted as bodily injury – whereas conceptions of privacy and reputation differ. Secondly, it should not come as a surprise that these peculiarities are reiterated when a conflict of laws rule is envisaged. When a general legal concept is not clear-cut but rather vague in the respective legal systems an initial reaction seems to be to not legislate on it at all and especially not on a supra-national level. This seems to be a first explanation for the fate of a conflict of laws rule for

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<sup>3</sup> Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199, p. 40 ff.

<sup>4</sup> Cf. Art. 1 (2) (g) Rome II Regulation.

cross-border invasion to privacy and reputation. In essence, because no common concept of privacy and reputation exists, no conflict of laws rule can be found.

As mentioned at the outset, close scrutiny revealed this to be incorrect. Triggered by an exceptional presentation by *J. Sunde*, it became common opinion in the workshops that no such deep-rooted differences in national law, in conflict rules and in methodology exist to justify the current stoicism.<sup>5</sup> What follows is a critical discussion and analysis of the current approaches. Having exposed the weaknesses of these approaches using the arguments furthered at the workshop, a path for reform – clearly drawing from Scandinavian-Germanic ideas on methodology – will be suggested.

#### 4. The Current European State of Law

The European Court of Justice's (CJEU) judgments regarding international jurisdiction (that is the international competence to hear a case) in *Bier*<sup>6</sup> and *Shevill*<sup>7</sup> is that a media outlet could be sued at his or her establishment for all the harm caused by a publication, or before the courts of each country where such publication was distributed and caused damage (however, in the latter case, solely in respect of the damage caused within the respective court's territory). Initially, the European Commission<sup>8</sup> also favoured such a "mosaic assessment". In parallel to the CJEU's findings, the law at the places of dissemination should be applied; however, again the latter laws should have relevance only concerning the infringement in the particular State of publication. Thus, the term "mosaic assessment" depicts a scenario where damage is sustained in several European Member States. In such a case, the laws of all the Member States concerned will have to be applied on a distributive basis as tiny pieces, thus giving together the full picture of the mosaic, that is full compensation.

Without explicit reference, this mosaic assessment mirrors the above-described hesitation of legislators in the divergent field of privacy and reputation in European substantive private law. Moreover, the mosaic assessment is arguably driven by prejudices against foreign law. The resulting argument is constructed along the following lines: the question whether and when an infringement of personality rights exists or is justified depends largely on national culture and social-legal reasons. Both can fundamentally differ even within Europe. A mosaic assessment would then

<sup>5</sup> See *Sunde's* chapter this volume.

<sup>6</sup> *Bier v. Mines de Potasse d'Alsace* (Case no. CJEU, C-21/76), [1976] ECR p. 1735.

<sup>7</sup> *Fiona Shevill and Others v. Presse Alliance SA* (CJEU, C-68/93), [1995] ECR I-415.

<sup>8</sup> European Commission, Proposal for a Regulation on the law applicable to Non-contractual obligation (Rome II) COM (2003) 427 final, 11: "The rule entails, where damage is sustained in several countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as 'Mosaikbetrachtung' in German law."

appear to fit perfectly and in the continued absence of a consensus of European values concerning privacy and reputation it seems appropriate to leave enough room for the differences using a distributive application of local national laws.<sup>9</sup>

The fragmentation of the applicable law as a result of the mosaic assessment is however in stark contrast with the intellectual development of conflict of laws in Europe in the last 150 years. Starting with Norwegian law, it became clear in the so-called *Irma-Mignon* case<sup>10</sup> that from a multitude of unambiguous national connections to a legal dispute, the law of the country with which the facts of the case are most closely connected should govern the whole case. Here, two Norwegian ships, *Irma* and *Mignon* collided in British territory due an error committed by the mandatory English pilot. The question to be answered was whether the liability of the shipping companies was to be settled according to English or Norwegian law.<sup>11</sup> The judge *E. Hanssen* was confronted with a lack of statutory provisions, customary law and precedent and had to rely on other legal bases in order to fill the gap. He held that the case

“... fortrinnsvis bør bedømmes etter loven i det land, hvortil det har sin sterkeste tilknytning eller hvor det naturlig hører hjemme.”<sup>12</sup>

in other words, that it was preferably to be judged according to the law of the country to which it has its closest connection or where it naturally belongs. Arguably, judge *E. Hanssen* held this independently of the development in continental Europe, where this principle of closest connection is also found basically in all States. Starting with *F.C. von Savigny* there is virtually unanimous consensus that the law of the country applies to which the legal relationship is most closely connected.<sup>13</sup>

As a result, both Norwegian and Germanic lawyers should certainly employ an argument based on precedent or legal history respectively. Resting on the differences between legal systems as an argument was the style of early 19th century discussions but not a characteristic of any approach in use today. Indeed, legal systems are different and accordingly the manner in which privacy and reputation are conceived and enshrined differs as well but this does not mean that the legal order of every affected State must be taken into account. Instead, only one State's law – i.e. that with the closest connection – should rule exclusively. The mosaic assessment relies on a historically out-dated principle of territoriality and should hence not be utilised.

<sup>9</sup> Cf. OLG Hamburg 8.12.1994, NJW-RR 1995, 792.

<sup>10</sup> Rt. 1923 II, p. 58 ff.

<sup>11</sup> The English pilot was not sued; arguably he was impecunious for the purpose of such a large-scale accident.

<sup>12</sup> Rt. 1923 II, p. 59.

<sup>13</sup> For the roots of this idea see *Friedrich Carl von Savigny*, *System des heutigen Römischen Rechts*, Vol. VIII, Berlin 1849, p. 28, 108, 120.

In addition, a systematic argument based on comparative observations could be rendered. As noted above, rules on conflict of laws and substantive law rules interact with each other. As a result, problems exist with a mosaic assessment when taking into account any non-pecuniary damages (*i.e.* moral damages or damages for pain and suffering) granted for infringements of privacy and reputation. In Norway, such damages are awarded as a “*plaster på såret*”<sup>14</sup> – a band-aid to the wound and are thus related to the aggrieved party alone.<sup>15</sup> Virtually all European legal systems would agree that non-pecuniary damages are granted as a relief for the psyche and the state of mind of the aggrieved party. To quote a Spanish proverb: “*los duelos con pan son menos*” – bread reduces the pain of mourning. And, without a doubt, in cases of infringements of privacy and reputation it is these non-pecuniary damages that is often at the heart of the aggrieved party’s claim.

Regarding the question of divisibility of such non-pecuniary damages, logic normally dictates that they are indivisible just as the psyche and the state of mind of the aggrieved party, for which relief it is granted. In other words, as non-pecuniary damages are awarded for the relief of the unitary state of mind of the aggrieved party, they are unitary and indivisible as well. Accordingly, in the context of conflict of laws such damages could differ proportionally depending on the number of times a publication appears. Nevertheless one degrading publication in multiple countries results in only one infringement of the feelings of the aggrieved party and, thus, in only one damage award. The psyche and the state of mind of the aggrieved party is relieved only once and not every time with the same publication in the next country. This finding obviously militates against a mosaic assessment where such damage would be assessed separately for each State.

As thoughtfully described by I. Helland/S. Koch in the report on Norwegian legal methodology, the practicability of a legal rule must also be taken into account as *reelle hensyn*.<sup>16</sup> The paradigm case would be a legal rule, which is easy to practice and thereby gives predictable results mitigating the potential for future conflicts. In essence, a legal rule should not be too technically complex.

With the implausible fragmentation rendered by the mosaic assessment, one has to doubt this paradigm of practicability in more realistic cases where a defamatory publication is distributed not only in two or three States but many more. Here, at first glance the CJEU’s decision in *Shevill*<sup>17</sup> may provide some help, since the judges held that the whole infringement could be compensated at the domicile of the media outlet. If the mosaic assessment is applied, contrary to the arguably good intentions of the CJEU, the court at the media outlet’s domicile has to apply

<sup>14</sup> Nils Nygaard, *Skade og ansvar*, 6<sup>th</sup> ed., Bergen 2007, p. 165.

<sup>15</sup> Cf. Lov 13. Juni 1969 nr. 26 om skadeserstatning (*skadeserstatningsloven*) § 3–5 and § 3–6.

<sup>16</sup> Cf. Helland and Koch’s chapter on Norwegian legal method in this volume. This “*reelle hensyn*” of practicability seems to have arguably no explicit counterpart in German methodology.

<sup>17</sup> See fn. 7.

the laws (and corresponding legal methods) of all the places where the publication was distributed depending on the respective infringement in that country. In other words, the judge at the domicile of the media outlet has *ex officio* to apply all relevant laws where the publication was disseminated in respect of the wrongful action of the media outlet and must embark upon a local assessment of damages grantable to the aggrieved party under said laws. This entails determining the loss of reputation territorially; that is, an assessment of whether and the extent to which the aggrieved party's standing was lowered and whether this was justified according to each respective Member State's law. He or she would then have to assess whether and to what extent a mental injury occurred in the respective Member State and how such distress is relieved there. Bearing in mind the differences in each jurisdiction and each protected domain due to cultural, political and socio-legal reasons as well as divergent codification and interpretation techniques, such a Herculean task should not be left to judges and one can sincerely doubt whether practice could ever meet this standard of factual and legal accuracy.<sup>18</sup> In cases with a substantial circulation of the offending material the judge will not, as he or she essentially cannot, apply all respective laws and will "cheat" by "guessing" the extent of the injury and corresponding damages; most probably he or she will estimate the wrongful conduct and damages as a whole and subsequently extrapolate the local wrongful conduct and local damages according to the quantity of dissemination in the respective countries. As a result the mosaic assessment does not meet the paradigm of practicability and would thus be dismissed by Norwegian practitioners and scholars as a whole.

## 5. Alternative Approaches

In response to this, some legal scholars<sup>19</sup> have argued for a general presumption in favour of allowing the aggrieved party a choice between the law of the domicile of the media outlet and the law of one of the places of dissemination. The connecting

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<sup>18</sup> So far no European Member State court has employed the mosaic assessment in that regard. For the experiences in the US with such an approach see e.g. *Hartmann v. Time, Inc.*, 166 F.2d 127 (3<sup>rd</sup> Cir. 1948): "... we must treat ... the place where publication occurred as covering the United States and the civilized countries of the world" and the comment by *William L. Prosser*, *InterState Publication*, *Michigan Law Review*, Vol. 51, 1993, pp. 959–1000, on p. 973: "That way madness lies" and *Learned Hand, J. in Mattox v. News Syndicate Co., Inc.*, 176 F.2d 897, 900 (2<sup>nd</sup> Cir. 1949): "... in application it would prove unmanageable".

<sup>19</sup> See *Gerhard Hohloch*, in: Walter Erman, *Handkommentar zum Bürgerlichen Gesetzbuch*, Vol. II, 12<sup>th</sup> ed., Cologne 2008, EGBGB Art. 40, para. 53; *Frank Vischer* in *Zürcher Kommentar, IPRG* (Schulthess, 2<sup>nd</sup> ed., Zürich 2004), Art. 139 IPRG, para. 12; *Adolf F. Schnitzer*, *Gegenentwurf für ein schweizerisches IPR-Gesetz*, *Schweizerische Juristenzeitung (SJZ)*, Vol. 76, 1980, pp. 309–316, on p. 314; *Kurt Siehr*, *Das Internationale Privatrecht der Schweiz*, Zürich 2002, p. 378.



factors proposed by the CJEU ought to be retained but the aggrieved party should choose only one of them, so that only one law is applied.

To some extent this was recently accepted by the CJEU for online publications also. In *eDate* the court allowed for the option of the plaintiff to bring an action: firstly, in respect of all the damage caused before the courts of the Member State in which the media outlet is established; secondly, before the courts of each Member State in the territory of which the content was physically distributed for the damage that occurred in the Member State of this court; and thirdly, albeit only for online publications, before the courts of the Member State in which the centre of his or her interests is based, that is, for the most part his or her habitual residence.<sup>20</sup> Rendered as a conflict of laws rule this would read as a choice for the aggrieved party between the mosaic assessment and his or her habitual residence.

Both solutions may be welcomed as the fragmentation of applicable laws which would result from a mosaic assessment is dismissed (at least in part) because only one Member State's law is applied. This would ease judges' burden and reflect the uniformity of the non-pecuniary damages correctly.

The Norwegian practitioner would nevertheless be stunned when confronted with such preference of the alleged victim over the alleged tortfeasor. Any Norwegian idea of justice must include striking a balance between the interests of both parties in order to produce a just and fair outcome.<sup>21</sup> Accordingly, none of the parties to a case should be preferred over the other. The proposed rule would apparently ignore any such balancing of the conflicting interests if the aggrieved party was allowed to choose one particular law. It seems excessive that only one party should have the opportunity to prefer his or her interests alone without any further reasoning.

## 6. Identifying an Exclusive Connection

As illustrated above, a distributive or alternative application of a multitude of laws does not provide for an adequate mechanism to deal with cross-border infringements of privacy and reputation. Instead, a viable solution to the shortcomings addressed could be the application of a single law identified using the principle of the closest connection calculated by assessing factors relevant to these cases, such as the following:

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<sup>20</sup> *eDate Advertising GmbH v. X* (CJEU, C-509/09) and *Olivier Martinez and Robert Martinez v. MGN Limited* (C-161/10).

<sup>21</sup> See *Helland and Koch's* chapter on Norwegian legal method in this volume.

### 6.1. Habitual Residence of the Aggrieved Party

To some extent implied by the Norwegian Supreme Court in *Irma-Mignon*,<sup>22</sup> later explicitly held in *Tour Bus*,<sup>23</sup> and also proposed by the European Group for Private International Law (EGPIL),<sup>24</sup> the preliminary draft proposal of the European Commission (2003),<sup>25</sup> and several Germanic legal scholars,<sup>26</sup> one may argue in favour of the exclusive application of the law at the habitual residence of the aggrieved party.

Indeed, the application of that law is convenient at first glance. A general assumption that the result of an infringement of privacy and reputation is generally within the estimation of the public at the domicile of the aggrieved party is not misplaced. Accordingly, as a common view Norwegian and Germanic practitioners may endorse this solution as the interest of the aggrieved party in maintaining their good standing within their chosen social environment would be respected. Remedying the diminution of estimation in the eyes of fellow members of society is the major focus of the relevant action in most societies so it seems natural to focus on these legal, moral and cultural conceptions crystallised at the domicile of the aggrieved party.

Additionally, aggrieved parties would be judged against a legal order they are familiar with and will have some knowledge of (at least in layman's terms). Moreover, in line with the above observation regarding the indivisibility of non-pecuniary damages, it is reasonable to assess the aggrieved party's damages according to the standards at his or her habitual residence, because the restitution of harm will be performed in this State. Hence, the market prices there will be decisive in assessing the factual amount of damages as the alternative comforts and pleasures are likely to be bought where the aggrieved party is domiciled. Fourthly and finally, in many cases it is a clear advantage that the law at the domicile of the aggrieved

<sup>22</sup> Rt. 1923 II p. 58

<sup>23</sup> Rt. 1957 p. 246.

<sup>24</sup> *Revue critique de droit international privé* (Rev. crit. DIP), Vol. 87, 1998, p. 802 ff.; *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax) 1999, p. 286 ff.; *Netherlands International Law Review* (NILR) Vol. 45, 1998, p. 465 ff.; *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ), Vol. 65, 2001, p. 550 ff.; *European Review of Private Law* (ERPL) Vol. 7, 1999, p. 46 ff.

<sup>25</sup> Art. 7 COM 2003 427 final, 2003/0168 (COD), for comment see *Andrew Dickinson*, The Rome II Regulation, Oxford University Press (OUP) 03/2008, p. 218 ff.; *Willibald Posch*, The 'Draft Regulation Rome II' in 2004: Its Past and Future Perspectives, *Yearbook Private International Law* (YPIL), Vol. 6, 2004, p. 129 ff.; *Jan von Hein*, Die Kodifikation des europäischen Internationalen Deliktsrechts, *Zeitschrift für Vergleichende Rechtswissenschaft* (ZVglRWiss), Vol. 102, 04/2003, pp. 528–562, on p. 557.

<sup>26</sup> *Evelyn Schwiegel-Klein*, *Persönlichkeitsverletzungen durch Massenmedien im Internationalen Privatrecht*, Tübingen 1983, p. 82 ff.; *Horst Ehmann* and *Karsten Thorn*, *Erfolgsort bei grenzüberschreitenden Persönlichkeitsverletzungen*, *Archiv für Presserecht* (AfP) 1996, pp. 20–24, on p. 23; *Bea Verschraegen*, in: Peter Rummel (ed.), *ABGB § 13 II/6*, Vienna, 3<sup>rd</sup> ed., 2005, para. 5.

party is a connecting factor to only one law, which thus represents the uniformity of the non-pecuniary damages correctly.

Against the mechanical application of this rule to all cases, Norwegians would certainly argue the overly strictness of such an approach. It would be reasoned that this would not fit as a general rule since numerous exceptions<sup>27</sup> need to be made in all cases where the assumption of the closest connection at the habitual residence of the aggrieved party is factually not true, for instance where the victim has only a formal domicile in a certain country and is not socially integrated into the local community. These concerns take on increased strength in the case of a public figure or celebrity since such persons tend to have multiple domiciles in different States and alternate between them due to their lifestyle or employment. The assumption that the interests of the aggrieved party are inseparably connected to his or her domicile simply does not reflect the itinerant lifestyles of persons in the public eye.

Secondly, the above-mentioned paradigm of balancing the conflicting interests of both parties<sup>28</sup> militates against a shift to a connecting factor which focuses on the aggrieved party alone. The application of the law of the domicile of the aggrieved party is not inherently more just than applying the law at the habitual residence of the relevant journalist or media outlet. Again, only the interests of the aggrieved party are being considered when the benefit of knowledge of the applicable law is handed to him or her.

Finally, in Norwegian methodology the sole application of the law of the habitual residence of the aggrieved party would be rejected due to *reelle hensyn*<sup>29</sup> as this could lead to unreasonable difficulties for any media company with serious coverage of foreign affairs because an overwhelming multitude of laws must be adhered to. The media company would consequently be obliged to undertake in-depth investigations into the law of the presumed effective State of habitual residence of each person on whom they wish to report. Besides the tremendous costs of research into foreign laws, such an approach would inevitably lead to situations where critical coverage would be impossible where such publication was punished domestically. If such regimentation of the free press existed that restrictive law would be applied even where a media company respected all standards of journalism in the law at its domicile. As a result the application of the law of the habitual residence of the aggrieved party would obviously pose a significant impediment to media freedom in a considerable number of cases.

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<sup>27</sup> See *Helland and Koch's* chapter on Norwegian legal method in this volume.

<sup>28</sup> See Subsection 5 above.

<sup>29</sup> See *Helland and Koch's* chapter on Norwegian legal method in this volume.

## 6.2. Habitual Residence of the Media Outlet

The application of the law of the domicile of the media outlet obviously corresponds with the latter argument of restriction of media freedom and, thus, the *reelle hensyn* mentioned. The law of the statutory seat, central administration or principal place of business of the media outlet will be clear to the companies, journalists, photographers, legal consultants, etc. Thus, the connecting factor encompasses the need that liability, that is the grounds for imputation of damage, must be determinable by the wrongful acting journalist and the media outlet before publication. Any unforeseeable application of a norm amounts to normative and official arbitrariness,<sup>30</sup> labelled in the area of media freedom as a “chilling effect” by the European Court of Human Rights (ECtHR).<sup>31</sup> If, as emphasised several times by that court, where the potential deterrent effect of an overly strict liability rule risks resulting in the general omission of critical journalism any such norm is incompatible with the European Convention on Human Rights (ECHR). Any rule relevant but unforeseeably so must similarly be incompatible as the media company could not anticipate its application. The same applies where a conflicts rule renders a national rule applicable but unforeseeably so. Where the unforeseeably applicable rule is of a much more stringent standard than the foreseeable rules, legal certainty is doubly violated. The latter argument would be a particularly convincing argument in Norwegian law due to the semi-constitutional position of the ECHR within the Norwegian legal system,<sup>32</sup> as well as the status of foreseeability as a fundamental value of the Norwegian legal system and therefore a particularly strong *reelt hensyn*.<sup>33</sup>

Nevertheless, applying the law of the habitual residence of the aggrieved party and the law at the statutory seat of the media outlet are two sides of the same coin – the connection takes only the interests of one party into account – here, those of the alleged tortfeasor. The application of the law at the statutory seat of the media outlet betrays a single-minded focus on one party, as this would again violate the above-mentioned requirement of balancing the interests of both parties.<sup>34</sup> Beyond the need for foreseeable imputation of damage, there is no compelling argument that the aggrieved party’s interests in being compensated in the estimation of his

<sup>30</sup> Cf. ECtHR, *Groppera Radio AG v. Switzerland* (10890/84) (1990) 12 EHRR 321; ECtHR, *Vereinigung Demokratischer Soldaten Österreichs v. Austria* (15153/89) (1994) 20 EHRR 56 with further references.

<sup>31</sup> Cf. ECtHR, *Lingens v. Austria* (9815/82) (1986) 8 EHRR 558, para. 44; ECtHR, *Thorgeir Thorgeirson v. Iceland* (13778/88) (1992) 14 EHRR 843, para. 68; ECtHR, *Barthold v. Germany* (8734/79) (1985) 7 EHRR 383, para. 58; ECtHR, *Jersild v. Denmark* (15890/89) (1994) 19 EHRR 1; ECtHR, *Goodwin v. United Kingdom* (28957/95) (1996) 22 EHRR, para. 39; ECtHR, *Bladet Tromsø and Stensaas v. Norway* (21980/93) (2000) 29 EHRR 125.

<sup>32</sup> See Helland and Koch’s chapter on Norwegian legal method in this volume.

<sup>33</sup> See Ingvill Helland, The permissibility and (conditional) recommendability of *contra legem* interpretations in Norwegian law, Retfærd 01/2014, pp. 17–42, on p. 26 and 33 ff.; Jan Fridthjof Bernt and Synne Sæther Mæhle, Rett, samfunn og demokrati, Oslo 2007, p. 179 and 306 ff.

<sup>34</sup> See Subsection 5.

or her fellow compatriots must be considered subsidiarily. It seems odd to subjugate the interests of the victims to those of the tortfeasor to the extent that the latter's standard determines even the entitlement to compensation.

## 7. An Approach inspired by Norwegian Methodology

The analysis above demonstrates that seeking to identify one sole factor to govern the process of identifying the applicable law is a fruitless and ultimately unjust exercise; no single connecting factor can hope to produce justice in all situations. Instead, systems incorporating several connecting factors could be created, which in essence establish the closest connection to the case at hand and thereby the law applicable.

### 7.1. Deductive Reasoning and Subsidiary References

The archetypal German starting point for such a rule would be simply to formulate several conditions to be fully met in order to determine the law with the closest connection. In this regard, any rule can be analysed and restated as a compound conditional statement of the form "if X, then Y". The second part ("then Y"), commonly known as *apodosis*, is prescriptive and for our purposes is evidently clear – it shall be the law with the closest connection and thus prescribes the one law that is applicable. The first part, ("if X"), the *protasis*, indicates the scope of the rule by designating the conditions under which the rule applies. A solution could thus be a *protasis* of several conditions to be thoroughly met in order to specify one law applicable. Such a *protasis* would exclude legal systems at various stages with only a minimal connection to the case or none at all.

### 7.2. A Flexible System

With a view to Norwegian and, indeed, Austrian legal methodology one may also argue for a more flexible system. As already mentioned, most European legal systems rely on a comprehensive balancing of the interests of both parties in determining whether there was a right to privacy or reputation at all and whether this right was infringed by the publication. Inevitably, such comprehensive balancing must also apply to the corresponding conflict of laws rule. In other words, no clear-cut set of several conditions to be exactly met would be formulated but a set of elements to be taken into account when prescribing the *protasis*.

Such balancing of interests is at the core of the Irma-Mignon-formula applied in Norwegian conflict of laws.<sup>35</sup> The paradigm is that the conflicting interests of the parties would be best served by the application of the law of the country to which the case has its closest connection. When assessing the case, in order to identify this closest connection, a number of factual elements (*tilknytningsfaktorer*) are taken into account. The relevance and the weight of one element in relation to another are determined largely by *reelle hensyn* and other principles of weight.<sup>36</sup> Of particular importance for such assessments are the fundamental arguments of predictability as well as justice and fairness (*rettferdighet*).<sup>37</sup> Under this approach, no clear-cut rule can be formulated. Instead, an assessment of the unique combination of *tilknytningsfaktorer* must be undertaken for each case.<sup>38</sup>

Most strikingly it became clear during the workshops that such a methodology has a counterpart not in Germany but in Austria. Here, the legal scholar *W. Wilburg* built a comprehensive system of law, which became known as the “Flexible System” (*bewegliches System*) approach to law. *Wilburg* developed his concept based on the notion that there is hardly any area of the law which can be perceived through the lens of a single guiding idea. Accordingly, the perspective must always be broader since legal rules are typically based on a plurality of value judgments and underlying purposes. Inasmuch as these can be identified, they also have to be observed in the application of the law. From that perspective, he inferred that those fundamental values (which he called “elements”) have varying degrees of influence on changing factual settings. Nevertheless, by recurring in alternate, but comparable circumstances, they can still be cited for a generalised description of the law as it is, as long as the extent of their impact can be considered in the individual case by way of gradations. Moreover, he held that all elements have to be considered in light of their specific interaction, and the choice of attributing more or less weight to one of them has to be justified on the basis of balancing all the interests involved.<sup>39</sup>

<sup>35</sup> See fn. 10.

<sup>36</sup> See *Helland* and *Koch*’s chapter on Norwegian legal method in this volume.

<sup>37</sup> See *Helland* and *Koch*’s chapter on Norwegian legal method in this volume.

<sup>38</sup> Cf. Rt. 1955 p. 872; Rt. 1973 p. 1268; c.f. *Torstein Eckhoff* and *Nils Kristian Sundby*, *Rettssystemer*, 2<sup>nd</sup> ed., Oslo 1991; *Torstein Eckhoff*, *Retningslinjer og “tumregler”*, *Tidsskrift for Rettsvitenskap* (TfR) 1980, pp. 145–163; *idem.*, *Guiding standards in legal reasoning*, *Current Legal Problems* (CLP), Vol. 29, 1976, pp. 205–219; *Gert Fredrik Malt*, *Svake normer*, TfR 1986, pp. 167–191; *idem.*, *Deontic Probability*, in: *Eugenio Bulygin et al. (eds.), Man, law and modern forms of life*, Vienna 1985, p. 233 ff.; *Nils Jareborg*, *Regler och riktlinjer – en replik*, TfR 1981, pp. 436–444; *idem.*, *Regler og riktlinjer*, TfR 1979, p. 385 ff.; *Nils Kristian Sundby*, *Sondringen mellom regler og retningslinjer*, TfR 1978, pp. 137–150; *idem.*, *Om normer*, Oslo 1974.

<sup>39</sup> *Bernhard A. Koch*, *Wilburg’s Flexible System in a Nutshell*, in: *Helmut Koziol and Barbara C. Steininger (eds.), European Tort Law 2001*, Vienna/New York 2002, p. 545 ff., para. 1–3; see also *Walter Wilburg*, *Elemente des Schadensrechts*, Marburg 1941; *idem.*, *Entwicklung eines beweglichen Systems im bürgerlichen Recht*. Rede, gehalten bei der Inauguration als Rektor magnificus der Karl-Franzens-Universität in Graz am 22. November 1950 = *The Development of a Flexible System in the Area of Private Law* (Translation by Herbert Hausmaninger, Vienna 2000; *idem.*,

In any case, such a methodology has roots in a number of European systems and is not an extraordinary innovation to legal methodology. For conflict of laws, for instance, it can be identified in the pre-Rome II regimes of a number of systems.<sup>40</sup>

### 7.3. Common Features

The guiding aim of both solutions is to apply the law which has the closest connection to the case by either focusing on a set of fixed, clear-cut conditional connecting factors or instead by avoiding an overly rigid structure. Both approaches must firstly explicitly identify all the relevant factors within such cases and, in case of a flexible system, subsequently weigh these elements according to their relevance. Ultimately, the law determined, that is the law with the closest connection, should govern the whole case at hand.

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Zusammenspiel der Kräfte beim Aufbau des Schuldrechts, *Archiv für die civilistische Praxis* (AcP), Vol. 163, 01/1964, pp. 346–379; *Franz Bydlinski et al.* (eds.), *Das Bewegliche System im geltenden und künftigen Recht*, Vienna 1986; *Franz Bydlinski*, A “Flexible System” Approach to Contract Law, in: *Herbert Hausmaninger et al.* (eds.), *Developments in Austrian and Israeli Private Law*, New York/Vienna 1999, p. 9 ff.; *idem*, *Juristische Methodenlehre und Rechtsbegriff*, Vienna 2<sup>nd</sup> ed. 1991, p. 529 ff.; *idem*, *Das bewegliche System und die Notwendigkeit einer Makrodogmatik*, *Juristische Blätter* (JBl) 1996, p. 683 ff.; *Claus-Wilhelm Canaris*, *Systemdenken und Systembegriff in der Jurisprudenz*, 2<sup>nd</sup> ed., Berlin 1983, p. 74 ff.; *Axel Flessner*, *Europäisches Privatrecht und bewegliches System*, JBl 2003, pp. 205–212; *Hasso Hoffmann*, *Neuere Entwicklungen in der Rechtsphilosophie*, Berlin/New York 1996, p. 13 ff.; *Helmut Koziol*, *Rechtswidrigkeit, bewegliches System und Rechtsangleichung*, JBl 1998, pp. 619–627, on p. 621 ff.; *idem*, *Basic questions of Tort Law from a Germanic Perspective*, Vienna 2012, p. 14 ff., no. 1/28 ff.; *Karl Larenz*, *Methodenlehre der Rechtswissenschaft*, 6<sup>th</sup> ed., Berlin et al. 1991, p. 469 ff.; *idem*, *Grundformen wertorientierten Denkens in der Jurisprudenz*, *Festschrift für Walter Wilburg zum 70. Geburtstag*, Graz 1975, p. 217 ff. (p. 226 ff.); *Gerhard Otte*, *Komparative Sätze im Recht*, *Jahrbuch für Rechtssoziologie* (JbRR), Vol. 2, Düsseldorf 1972, p. 301 ff.; *Bernd Schilcher*, *Theorie der sozialen Schadensverteilung*, Berlin 1977; *idem*, *Neuordnung des österreichischen Schadenersatzrechts*, in: *Magnus Ulrich and Jaap Spier* (eds.), *European Tort Law. Liber amicorum for Helmut Koziol*, Frankfurt am Main 2000, p. 293 ff.; *idem*, *Der Regelfall als Verbindung von Tatbestandsmodell und beweglichem System*, *Festschrift für Helmut Koziol*, Vienna 2010, p. 853 ff.; *Thomas Schobel*, *Der Ersatz frustrierter Aufwendungen*, Vienna/New York 2003, p. 179 ff.; *Thiede*, fn. 2 p. 382 ff.

<sup>40</sup> For example, the UK position on applicable law in this area can be found in the Private International Law (Miscellaneous Provisions) Act 1995. Sec. 11 states that: “Where elements of those events [torts] occur in different countries, the applicable law under the general rule is to be taken as being ... the law of the country in which the most significant element or elements of those events occurred.”

## 7.4. Elements

### 7.4.1. Perception of the Public

As demonstrated, the aim of applying only one law with the closest connection to the whole case does not produce a compelling result when automatically only the law at the domicile of the media outlet or the aggrieved party is applied. Moreover, the tortfeasor and aggrieved party are not the only protagonists on the scene. One key paradigm in substantive law provides that the assessment of whether or not the privacy and reputation of a person is harmed depends above all on the way in which the particular national community evaluates the situation.<sup>41</sup> Accordingly, how the defamatory publication is perceived by the State's general public must also play a crucial role for the conflict of laws rule.

Reference to the place where such public considers a publication to have violated an individual's reputation or privacy seems a compelling starting point as this does not favour the interest of any one party and can only be manipulated by either party with difficulty. Nevertheless, although this connecting factor adequately balances the interests of both parties, the crux of the matter of applying one single law remains if a publication was widely distributed. Hence, within either approach a further element must be introduced to single down one applicable law.

### 7.4.2. Foreseeability of the Applicable Law

From a Norwegian perspective a necessary condition of any conflict of laws rule ought to be that only those legal systems whose application could be foreseen by the defendant should be utilised. In consequence, *tilknytningsfaktorer* favouring the most predictable solution will be afforded utmost weight in the balancing process. This results from the position of predictability as a fundamental legal principle<sup>42</sup> of Norwegian law and a pre-condition of the legitimacy of any legal rule.<sup>43</sup> Additionally, it is demanded by the ECHR, which holds, as mentioned above, a semi-constitutional role within the Norwegian legal system.<sup>44</sup> Concordantly, from a Germanic perspective it is obvious that the legislator can impose only an obligation on their citizens which is clearly defined with regard to its extent and likely outcome as this is demanded by the constitutions in the respective countries and the ECHR too.<sup>45</sup> In essence, only a rule knowable in advance gives the citizen the option to adjust their conduct accordingly.

<sup>41</sup> For references see fn. 2.

<sup>42</sup> See *Helland and Koch's* chapter on Norwegian legal method in this book.

<sup>43</sup> See *Helland and Koch's* chapter on Internationalisation in this book.

<sup>44</sup> See *Helland's* chapter on German legal method in this book.

<sup>45</sup> See *Walter Berka*, Persönlichkeitsschutz und Massenmedien im Lichte der Grundfreiheiten und Menschenrechte, in: *Helmut Koziol and Alexander Warzilek* (eds.), *The Protection of Personality Rights against Invasions by Mass Media*, Vienna/New York 2005, p. 502 ff., no. 27 ff. and references in fn. 30 ff.



Thus, a necessary condition of any conflict of laws rule ought to be that only those legal systems where the perception of the public could be foreseen by the defendant media outlet should be open for application. Just as substantive law requires foreseeable criteria to impute an infringement of privacy and reputation to the media outlet in order to prevent a chilling effect, the conflict of laws solution requires the additional element of foreseeability to justify the application of a distinct law providing for the latter's responsibility.<sup>46</sup>

Still, in the world of modern media it is clear that any test based on foreseeable perception of the public will continue to result in multiple applicable laws, for example in cases of online publications. Finding only one applicable law must then involve assessing an additional suitable connecting factor to one of these systems.

#### 7.4.3. Social Connections of the Aggrieved Party

As indicated above,<sup>47</sup> where the State in which the aggrieved party actually habitually resides is among the systems where the publication was foreseeably addressed to the public it stands out as a suitable narrowing factor supported by *reelle hensyn*: Firstly, this connecting factor serves as a simple proxy for the place where the aggrieved party maintains his or her significant social connection. Such connection may also include the country in which the family of the aggrieved party lives or where the predominant numbers of business contacts exist.<sup>48</sup> Secondly, so as to adequately respect the interests of the media outlet, attention must then be turned to the aggrieved party's compensation. It seems correct to assess the aggrieved party's non-pecuniary damages according to the standards at his or her habitual residence, because the restitution of harm will arguably be performed in that country.

Nevertheless, where changes of domicile are frequent or where a person enjoys an international reputation, the assumption of a connection between the aggrieved

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<sup>46</sup> Of course, the term "foreseeable" then needs to be characterised in conflict of laws, which cannot be addressed in detail here. Nevertheless, comparative studies reveal that both a majority of European legal systems and secondary EU law favour an objective approach together with an abstract assessment of behaviour. See *Pierre Widmer*, Comparative Report on Fault as a Basis of Liability and Criterion of Imputation, in: Pierre Widmer (ed.), *Unification of Tort Law: Fault*, The Hague 2005, p. 347 ff., no. 39 ff.; *Markus Kellner*, Comparative Report, in: Helmut Koziol and Reiner Schulze (eds.), *Tort Law of the European Community*, Vienna/New York 2008, p. 564, no. 22/19. Thus, the concept of autonomous characterisation employed by the CJEU providing that concepts in conflict of laws "must be given an autonomous meaning, derived from ... the general principles underlying the national systems as a whole" will in all likelihood result in the application of such an objective standard, cf. *LTU Lufttransportunternehmen v. Eurocontrol* (CJEU 29/76), [1976] ECR p. 1541. As a result, the question whether the defendant media outlet, journalist, etc. was able to foresee the perception of a publication abroad will most certainly be assessed objectively; that is with regard to the typical occupational skills of a journalist.

<sup>47</sup> See Subsection 5.

<sup>48</sup> For this approach see e.g. *Oberster Gerichtshof (OGH)*, 8 Ob 235/74, *Juristische Blätter (JBL)* 1976, 103.

party and a particular identifiable social environment does not exist, can be difficult to determine or is entirely arbitrary.

Moreover, any approach based on deducing from the states of foreseeable publication the perception of that public is limited in cases where the all-important public was addressed by a publication in countries other than the country of the domicile of the aggrieved party.<sup>49</sup> Here, it is not possible to formulate a *protasis* fully incorporating both conditions.

#### 7.4.4. Extent of Publication

A suitable alternative approach would be to focus on the extent of distribution within the various systems. This argument seems an exemplary argument for the Norwegian style *relle hensyn* and is construed along the following lines:

The law of the system in which the highest extent of distribution has taken place suggests itself as appropriate because the aggrieved party will be able to serve not only his or her own interests but also satisfy a wider societal function. Against the persistence of a false picture of the aggrieved party which would be the result of extensive circulation due to repetition, balanced media coverage can only be secured when the aggrieved party can generate a counterweight to such repetition.<sup>50</sup> By pursuing his or her own interests in the State with the greatest distribution, this spiral of silence may be antagonised best and the aggrieved party can most successfully reverse the overall, international momentum of distribution.

However, there are limits to this approach. If only a small number of defamatory publications reach a State where the aggrieved party had extremely significant social connections, the latter – arguably appropriate law – would not be applied.<sup>51</sup> For instance, if the aggrieved party maintains significant business contacts in a certain system and only a very limited amount of coverage concerning the aggrieved

<sup>49</sup> See e.g. the case of Kurt Waldheim, United Nations Secretary-General (1972–1981) and President of Austria (1986–1992), who faced accusations in US-Media for his service as an intelligence officer in the Wehrmacht during World War II and was at the very same time elected to power at home. Throughout his term as Austrian president, Waldheim and his wife Elisabeth were officially deemed *personae non gratae* by the United States.

<sup>50</sup> Most people fear reprisal or social isolation and gauge public opinion as an incentive for adhering to societal standards. The ability to speak openly and address societal issues differs between citizens; those whose opinions are publicly underrepresented become less likely to speak out and the (only assumed) majority's opinion becomes the status quo ("spiral of silence"). The mass media have an enormous impact on how public opinion is portrayed and can dramatically impact an individual's perception about where public opinion lies. C.f. Dietram A. Scheufele and Patricia Moy, Twenty-five years of the spiral of silence: A conceptual review and empirical outlook, *International Journal of Public Opinion Research*, Vol. 12, 2000, pp. 3–28; Dieter Fuchs, Jürgen Gerhards and Friedhelm Neidhardt, Öffentliche Kommunikationsbereitschaft: Ein Test zentraler Bestandteile der Theorie der Schweigespirale, *Wissenschaftszentrum Berlin für Sozialforschung (WZB)* 1991, pp. 1–24.

<sup>51</sup> See Paul Lagarde, *Rev. crit. DIP*, Vol. 85, 1996, p. 501: "Tout dépend évidemment du public atteint par les exemplaires diffusés."

party was distributed there but the significant business contacts received them, the non-application of this law could result in an inappropriate restriction in favour of the defendant.<sup>52</sup> Again, a *protasis* enclosing all conditions will fail.

### 7.5. Conclusion

Any clear-cut, conditional “German” rule comes with such rigidity that it may do serious injustice in many particular cases. It is submitted here that this strictness is one of the most unfortunate characteristics of German methodology and is found in many fields of German private law.<sup>53</sup> For instance, contracts are either valid or invalid almost always resulting in cancellation or remission instead of adoption – thereby putting buyers who are in need of the goods purchased at a disadvantage.<sup>54</sup> This unnecessary strictness extends to the law of restitution<sup>55</sup> and, of course, to the law of tort, where the classic German position is that there is a duty to compensate either in full or not at all.<sup>56</sup> This tendency of abrupt either-or solutions has led German courts to manipulate the requirements for liability in order to avoid inequitable results;<sup>57</sup> in other words, they started to “cheat”. On the contrary, Austrian, Swiss and indeed Norwegian legal methodology achieves a balance differently and more importantly culminate in flexible outcomes.<sup>58</sup>

As a result, having identified the drawbacks of overly rigid rules, a more adaptable solution for cross-border infringements to reputation and privacy is to be advocated. What follows is a flexible system based on the above analysis of all relevant elements or *tilknytningsfaktorer* might be arranged.

If the publication was perceived within multiple countries, the law of the country to which the publication has the closest connection should be applied. In determining this closest connection utmost weight is given to a fair and predictable solu-

<sup>52</sup> See OGH, 8 Ob 235/74, JBl 1976, 102 (103); *Gerhard Wagner*, Ehrenschaft und Pressefreiheit im europäischen Zivilverfahrens- und Internationalen Privatrecht, *RabelsZ*, Vol. 62, 1998, pp. 243–285, on p. 276.

<sup>53</sup> See *Hinghofer-Szalkay*’s chapter in this book.

<sup>54</sup> See BGB §§ 134, 139, 142 and *Helmut Koziol*, Glanz und Elend der deutschen Zivilrechtsdogmatik, *AcP*, Vol. 212, 2012, pp. 1–62, on p. 7 ff.

<sup>55</sup> For examples (viz. BGB § 817 s.1) see *Lars Klöhn*, Die Konditionssperre gem. § 817 S. 2 BGB beim beidseitigen Gesetzes- und Sittenverstoß, *AcP*, Vol. 210, 2010, p. 804 ff.

<sup>56</sup> See, for instance, the limitation of protected rights in BGB § 823(1) and the need for full fault on the part of the tortfeasor to obtain full compensation.

<sup>57</sup> See *Koziol* 2012, fn. 39 Art. 13, no. 1/26 and fn. 54.

<sup>58</sup> For instance in Austrian and Swiss contract law only a part rescission is advocated in cases where the buyer wants to keep the goods, see ABGB § 878 and Art. 20 Abs. 2 OR. The law of restitution ABGB § 1174 essentially differentiates more on the grounds of the enrichment and in tort law ABGB § 2195 (1) and Art. 41 OR provide for general clauses; the ABGB takes into consideration the gravity of fault and provides for only partial compensation in the case of slight negligence.

tion because predictability and fairness are the fundamental principles of any legal system and essential for the legitimacy of the law.

Firstly, fairness is normally given when applying the law where the public perceived the publication as this does not favour the interests of any one party and can only be manipulated by either party with difficulty. A first flexible rule would thus read as follows.

*The more one of the States represents the public perceiving the publication or broadcast, the more this State's law should be applied.*

Secondly, predictability of the application of these laws must be based on the test whether an ordinary journalist etc. could objectively foresee that the public in another State would perceive the publication. A second flexible rule would thus read as follows.

*The more the perception of a State's public was objectively foreseeable to the defendant tortfeasor, the more this State's law should be applied.*

Thirdly, the type of social connection of the aggrieved party would then be assessed, establishing the extent and type of harm suffered. This results in a third, consecutive yet flexible rule.

*The more one of the States where the public perceives the publication or broadcast foreseeably represents the social connections, especially the habitual residence of the aggrieved party, the more this State's law should be applied.*

Finally, the nature and the quantity of the distribution of the publication within each legal system must be assessed. A final flexible rule could thus read as follows.

*The higher the extent of distribution of the publication was between States where the public foreseeably perceived the publication, the more this State's law should be applied.*

Of course such a rule could be rendered in the negative.

*The application of a national law has to be the more dismissed, the less this legal system represents the perception by the public of an infringing publication or broadcast, the less the application of this law was objectively foreseeable for the defendant media outlet, the less this system represents the social connection of aggrieved party and the less this publication or broadcast was distributed in this legal system.*

Finally, with a view to the Rome II Regulation and with more weight on the perception of the public and the foreseeability for the defendant media outlet another suitable phrasing could be the following.

*In the case of a non-contractual obligation arising out of violations of privacy or rights relating to personality, including defamation, the law of the State where the perception of the public of the infringing publication or broadcast was objectively foreseeable for the defendant shall be applied.*

*If the publication or broadcast was perceived within multiple countries, the law of the country to which the publication or broadcast has the closest connection shall be applied. This closest connection is determined by weighing each of the following factors: the social connection of the aggrieved party to each country, especially the*

*common habitual residence of the aggrieved party; the nature and extent of distribution within each country.*

## 8. Concluding Remarks

This analysis of cross-border invasions to privacy and honour discloses a pressing need for reform. The status quo is antiquated and the European legislator is called for reform. Pan-European media markets – even in the absence of the Internet – are an increasing feature of modern life. The easy availability of media on- and off-line, distributed far beyond the national borders of a media outlet's home State, and an ever information-hungry public are apt to produce even more complicated cross-border infractions in the coming years.

In lieu of a European consensus on reputation and privacy these problems are best tackled by an explicit and flexible conflict of laws rule like the one suggested here. Only such a rule is adequately respectful of the importance of balancing journalism against privacy and reputation as well as the interests of both media outlets and the subjects of injurious media coverage.

Nonetheless, proponents of such flexible rules are persistently confronted by a small fraternity of mostly Austrian *emeriti* tediously reiterating a stereotypical counterargument of endangering legal certainty.<sup>59</sup> Against this and from a Norwegian perspective, quite the opposite seems to be correct. Predictability of any rule can only be achieved when courts clearly consider and state the relevant factors and their weight in the respective judgments. Addressing and weighing of the relevant elements – instead of manipulating the law and facts to avoid inequitable results – renders decisions predictable.

From the conflicts of laws perspective those hecklers may also be ignored. A flexible system, as a methodological approach, is particularly appropriate for an area of law which essentially always was a flexible system. Conflict of laws never was and still is not governed by exceptionally rigid rules but strives for a flexible approach using a standard of the closest connection.

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<sup>59</sup> See Constanze Fischer-Czermak, Der Entwurf einer allgemeinen Gefährdungshaftung, Österreichische Notariatszeitung (NZ) 01/2006, p. 1 ff.; Christian Huber, Reform des österreichischen Schadenersatzrechts, in: Rudolf Reischauer et al., Reform des Schadenersatzrechts, Vol. II, Vienna 2008, p. 83; Ferdinand Kerschner, Haftung nach reiner Billigkeit?, in: *idem*, p. 107 ff., on p. 108; Rudolf Welser, Braucht Österreich ein neues Schadenersatzrecht?, in: *idem*, p. 1; Rudolf Reischauer, Reform des Schadenersatzrechts?, Österreichische Juristen-Zeitung (OJZ) 2006, p. 391 ff., on p. 392; *idem*, Schadenersatzreform – Verständnis und Missverständnisse, Juristische Blätter (JBl), Vol. 131, 07/2009, p. 405 ff., on p. 484; *idem*, Entwicklungstendenzen bei den Haftungsstrukturen, JBl, Vol. 134, 09/2012, p. 545 ff.; Karl Spielbüchler, Dankt der Gesetzgeber ab? – Gegen das Abschieben der Entscheidung, JBl 2006, p. 341; Georg Wilhelm, Aufgabe des Schadenersatzrechts ist es, Schaden auszugleichen..., Zeitschrift für Wirtschaftsrecht (ecolex) 2005, p. 497 ff.

What remains is the hope that the blindfold is removed and all those fiercely believing in the superiority of German methodology are exposed to light: sometimes even small jurisdictions produce compelling results.

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